Supreme Court, U.S.
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91-786

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

ERNEST L. CLARKE, *Petitioner*,

v.

LOMA LINDA FOODS, INC., LARRY BOGGESS, TED O. COOK, NABIL RAZZOUK, ADAM SCHLERETH, and JAMES SMEENGE, *Respondents*.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, after the Supreme Court decision in Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989), a plaintiff may maintain a cause of action against respondent employer under 42 U.S.C. § 1981 for racially motivated impairment of his right to enforce a contract of employment where, under the facts as alleged, respondent employer, for racial reasons, frustrated plaintiff's attempts to resolve grievances through non-judicial internal administrative processes.

2. Whether, after the Supreme Court decision in Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989) a plaintiff may maintain a cause of action under 42 U.S.C. § 1981 for racially motivated impairment of his right to make sales contracts where, under the facts as alleged, defendant employer of the plaintiff restricted plaintiff's sales to "blacks only" but placed no similar constraint upon its white sales representatives.

3. Whether, after the Supreme Court decision in Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989) a plaintiff may maintain a cause of action under 42 U.S.C. § 1981 for racially motivated impairment of his right to make a contract of employment where, under the facts as alleged, defendant employer refused to discuss the terms and conditions of open positions for which plaintiff was qualified after employer had advised plaintiff that his existing position was being eliminated.

4. Whether the petitioner was denied substantial justice through a combination of adverse rulings not supported by the facts, including (1) the granting of defendants' motion to transfer the case from Illinois to California, (2) the granting of the court's motion to dismiss the pendant state claims, (3) the denial of plaintiff's motion for entry of default and for default judgment for failure of defendants to timely answer or to otherwise plead, and for sanctions for failure

of defendants to timely prepare the case for trial, and (4) the granting of defendants' motion to dismiss.

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OPINION BELOW

The opinion of the Court of Appeals, was in the form of a Memorandum Decision, not approved for publication. It is reported as Table Case at 933 F.2d 1013, 1991 U.S. App. LEXIS 22733. The full text appears in the Appendix hereto.

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was entered by the Ninth Circuit Court of Appeals on May 28, 1991. Petition for rehearing was denied by order of the court entered on July 9, 1991. An order extending to November 6, 1991, the time within which to this petition for writ of certiorari may be filed was entered by this Court on October 2, 1991. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

United States Code, Title 42, § 1981:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

The petitioner Ernest L. Clarke respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 28, 1991.

Mr. Clarke, a black Jamaican-American, alleged in his Second Amended Complaint that

the respondents, for racial reasons, engaged in conduct which impaired his ability to enforce his contract of employment with respondents, to make a new contract of employment with them, and to make certain sales contracts, in violation of 42 U.S.C. § 1981. The District Court dismissed Mr. Clarke's complaint for failure to state a cause upon which relief may be granted, based upon the 1989 Supreme Court decision in Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989). Mr. Clarke's claim against the corporate defendant, Loma Linda Foods, Inc., was also held to be barred by the applicable statute of limitations.

Mr. Clarke appealed from this decision to the Ninth Circuit on the basis of eight (8) separately identified issues, including the two which the District Court considered dispositive, i.e., the holding of Patterson, and the applicable statute of limitations. The Ninth Circuit affirmed the District Court,

but did so on the basis of the Patterson decision alone, leaving the statute of limitations question for another day.

Mr. Clarke is asking this Court to rule on the issue of whether, as a matter of law, under the facts as he has alleged, the he did state a claim upon which relief may be granted, the Patterson decision notwithstanding. These include factual allegations that the respondents (defendants) (1) by conscious misrepresentation and delay, denied petitioner access to administrative methods of enforcing his employment agreement, (2) refused to negotiate with Mr. Clarke regarding the terms and conditions of other open positions in the company for which he was qualified, and (3) impaired Mr. Clarke's ability to make sales contracts due to a policy of the company that restricted his sales to predominantly black communities only.

JURISDICTION IN THE LOWER COURTS

Jurisdiction over this matter in the U. S. District Court is based upon 28 U.S.C. § 1331 (federal question), and 42 U.S.C. § 1981. Jurisdiction in the United States Court of Appeals for the Ninth Circuit is based upon 28 U.S.C. § 1291 and upon Rules 3 and 4 of the Federal Rules of Appellate Procedure for final orders appealable as of right.

REASONS FOR GRANTING THE WRIT

1. The Court Below Failed to Give Due Emphasis to the Fact That the Primary Focus of the Patterson Case Is the "Contract" Aspect of 42 U.S.C. § 1981, Not With the Fact That the Case Arose in the Context of Employment, and As a Consequence Failed to Deal Fairly With Plaintiff's Allegations of Racially Motivated Impairment of Contract, and Created a Conflict With Another Court of Appeals.

For the petitioner Mr. Clarke, the most umfortunate aspect of the decision of the Supreme Court in Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989) is the fact that the case arose in the context of employment. Both the district court and the court of appeals analyzed Mr. Clarke's second amended complaint by considering first, last, and foremost that Mr. Clarke was an employee of Loma Linda Foods and concluded that since Patterson, Section 1981 could no longer be applied to the racially motivated misconduct complained of since it occured after the employment contract had been properly concluded.

Petitioner has urged that such an analysis is an unfounded though commonly held misperception of the holding of this Court in Patterson. Fortunately, most of the lower courts that have decided Section 1981 cases after Patterson appear not to have been so misled. Judging from the more than 120 cases

that have been reported from the lower federal courts, the courts have usually granted motions for summary judgment or for involuntary dismissal in those cases involving mere racial harrassment. See, for example, Khabo v. Linnon, 1991 U.S. Dist. LEXIS 7014. However, in other cases such as those in which a distinguishbly new contract is involved, the courts have found that the plaintiff may still maintain a cause of action. See, for example, DeBailey v. Lynch, 734 F.Supp. 974 (M.D.Fla. 1990).

But there is some genuine inconsistency and confusion in the lower courts, especially at the trial court level, on the application of Patterson. Of particular interest in the present case is the fact that although most courts would appear to hold that discrimatory disharge is no longer actionable under Section 1981, the Eighth Circuit in Hicks v. Brown, 902 F.2d 630 (8th Cir. 1990) has held that such discharges directly affect the right to

make contracts, and is therefore cognizable under Section 1981.

Mr. Clarke, also alleged racially motivated discharge, but he alleges other things that are even more compelling--that defendants frustrated his attempts to access the internal grievance process so that he might "enforce" his contract under Section 1981, and that they denied him his Section 1981 right to "make" a new contract by refusing to discuss the terms and conditions, or otherwise consider him for other open positions after being notified that his existing position was being eliminated. If the lower court had evaluated Mr. Clarke's allegations strictly from the "contract" point of view, and not from the "employment" point of view, Mr. Clarke's action may have been allowed to stand, and the conflict with the Eighth Circuit in Hicks may have been avoided.

2. The Decision Below Failed to Properly Consider That the Patterson Decision Limiting 42 U.S.C. § 1981 to Cases Involving the Making and Enforcing of Contracts Does Not Grant an Immunity to Employers Who Impair the Right of Employee Sales Representatives to Make Sales Contracts.

In a straight Section 1981 "contract" analysis, Mr. Clarke would certainly have a cause of action against anyone who tried to restrict his sales (contract) activities, as a black salesman, to predominantly black neighborhoods only. To hold his employer and its agents to a lesser standard is to suggest that employers are granted a certain immunity from Section 1981 claims by virtue of the employment relationship. This is precisely the analysis that should have been applied by the lower courts. Instead, the lower courts

took the view that such an analysis was put forth by Mr. Clarke simply as an attempt to avoid the "strictures" of Patterson, giving still further evidence of a strong disinclination to view Mr. Clarke as a person with contract rights under Section 1981, but simply an employee complaining of racial harassment.

Indeed, this attempt by Mr. Clarke to apply the language of Section 1981 in a straightforward and narrow manner is entirely consistent with this Court's reasoning in the Patterson case.

3. The Decision Below Is Patently Inconsistent With Findings of Fact or With Facts That Are Not Controverted.

The lower courts, whether for reasons already suggested or otherwise, ignored or misstated several important factual matters about which there could be no dispute. The

result was a denial of substantial justice to Mr. Clarke related to venue, to costs and inconvenience, and undue delay. For example, in approving the decision by the District Court for the Northern District of Illinois to make a Section 1406 transfer of Mr. Clarke's case to the Central District of California, the Ninth Circuit completely overlooks the fact that Mr. Clarke never complained about any acts which took place at a certain meeting in California regarding the decision by defendant Loma Linda Foods to close its Great Lakes Territory. Mr. Clarke does complain of subsequent acts that deviated from the decision announced at that meeting, acts which did not take place in California, but rather in Illinois and certain east coast locations.

Other rulings adverse to Mr. Clarke, but not supported by the facts, include (1) the granting of the court's motion to dismiss the pendant state claims, (2) the denial of plaintiff's motion for entry of default and

for default judgment for failure of defendants to timely answer or to otherwise plead, and for sanctions for failure of defendants to timely prepare the case for trial, and (3) the granting of defendants' motion to dismiss.

CONCLUSION

WHEREFORE, petitioner Ernest L. Clarke respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit as entered in this proceeding on May 28, 1991.

Respectfully submitted,

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November 6, 1991

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERNEST L. CLARKE,	)	
	)	No. 90-55284
Plaintiff-Appellant,	)	
	)	D.C. No. CV-88-1403-RB
v.	)	
	)	
LOMA LINDA FOODS, INC.; LARRY BOGGESS, TED O. COOK; NABIL RAZZOUK; ADAM SCHLERETH; and JAMES SMEENGE,	)	MEMORANDUM*
Defendants-Appellees.	)	

Appeal from the United States District Court for the Central District of California
Robert C. Bonner, District Judge Presiding

Argued and Submitted May 6, 1991
Pasadena, California

Before: NORRIS, LEAVY, and TROTT, Circuit Judges.

Ernest L. Clarke appeals the district court's dismissal of his second amended complaint claiming racial discrimination in employment under 42 U.S.C. § 1981. Clarke

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

alleges that his employer, Loma Linda Foods, and certain officials thereof impaired his ability to make contracts on the basis of race. We affirm.

DISCUSSION

I. Transfer of Venue

Clarke first contends that the United States District Court for the Northern District of Illinois erred by transferring venue to the Central District of California pursuant to 28 U.S.C. § 1391.[1] Section 1391 states:

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[1] The appellees assert that we should not consider this issue on appeal because Clarke's Notice of Appeal lists the transfer order of November 18, 1987, as the order to which he assigns error, when in fact it was the order of February 25, 1988, on which the case was actually transferred. We disagree. We have held that "a mistake in designating the judgment appealed from should not bar appeal as long as the intent to appeal a specific judgment can be fairly inferred and the appellee is not prejudiced or misled by the mistake." United States v. One 1977 Mercedes Benz, 708 F.2d 444, 451 (9th Cir. 1983). We find that Clarke's intent to appeal from the February 25, 1988 transfer order can be fairly inferred and that the appellees have not been prejudiced by the mistake.

> (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

28 U.S.C. § 1391(b) (1988). Here, the parties agree that all the defendants did not reside in one state or judicial district. Hence, venue is only proper in the judicial district "in which the claim arose." Id.

Clarke maintains that the discriminatory acts complained of took place in Illinois. The appellees assert that all the operative decisions and conduct that Clarke complains of took place in California. In cases in which it is not clear that the claim arose in only one specified district, the Supreme Court has stated that:

> a plaintiff may choose between those two (or conceivably even more) districts that with approximately equal plausibility--in terms of the availability of witnesses, the accessibility of other relevant evidence, an the convenience of the defendant (but not the plaintiff)--may be assigned as the locus of the claim.

Leroy v. Great Western United Corp., 443 U.S. 173, 185 (1979).

The district court transferred Clarke's action to the Central District of California pursuant to 28 U.S.C. § 1406(a). A transfer under section 1406(a) is proper only is venue is improper in the transferor court. Central Valley Typographical Union No. 46 v. McClatchy Newspapers, 762 F.2d 741, 744 (9th Cir. 1985). The district determined that under Leroy, Clarke's action arose in California, not Illinois.

We review the district court's determination of where the claim arose de novo. Id. at 745.

We hold that the district court did not err by transferring Clarke's action to the Central District of California. We agree with the district court's finding that all the operative decisions and conduct by Loma Linda Foods, Clarke's previous employer and the primary defendant in this action, and by its

co-defendant personnel took place in California. Loma Linda Foods is a California-based corporation. The meeting at which it was determined that the Great Lakes Sales Territory, for which Clarke was one of three sales representatives, would be closed took place in California. The decision that Clarke's new sales territory would be in New York was made in California. These events culminated in a dispute between Clarke and Loma Linda Foods that eventually led to his constructive termination. In light of the Supreme Court's guidance in Leroy to the effect that "the availability of witnesses, the accessibility of other relevant evidence, and the convenience of the defendant (but not the plaintiff)" will be considered, we agree with the district court that Clarke's claim does not meet the test of being of "approximately equal plausibility." See Leroy, 443 U.S. at 185. We therefore conclude that venue was improper in Illinois, and that

the district court's transfer of Clarke's action to the Central District of California was not error.

II. Dismissal of Pendant State Law Claims

Clarke also contends that the district court abused its discretion by dismissing his pendant state claims. Clarke asserts that these state claims, alleging breach of contract, breach of the covenant of good faith and fair dealing, and intentional interference with contract, share a common nucleus of operative pact with the federal claims and therefore should not have been dismissed.

We review a district court's decision to dismiss pendent state claims for abuse of discretion. Forsberg v. Pacific Northwest Bell Tel. Co., 840 F.2d 1409, 1421 (9th Cir. 1988).

The Supreme Court has cautioned that:

> pendant jurisdiction is a doctrine of discretion, not of plaintiff's right. It's justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present

> a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties..."

United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (footnote and citation omitted). Here, the district court dismissed the claims upon the reasoning that the state law claims would predominate in the lawsuit and result in decisions of California law, that the state law claims would require substantial additional evidence at trial, that a jury would be confused by the separate causes of action, and that judicial economy would not be served by retaining the pendant claims. Under these guiding principles and upon review of the record, we conclude that the district court did not abuse its discretion by dismissing the pendent state claims.

III. Dismissal of Clarke's Action

Clarke next contends that the district court erred by dismissing his action. The

district court dismissed Clarke's action upon finding that Clarke's claim for racial discrimination was protected by 42 U.S.C. § 1981 as construed by the Supreme Court in Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989) and that in the alternative, Clarke's action was barred by the applicable statute of limitation. Clarke argues that the Supreme Court's decision in Patterson v. McLean Credit Union does not affect his claims of racially motivated impairment of contract under section 1981. Clarke also asserts that the district court applied an incorrect statute of limitations to his action, and even if it did not, that appellees waived the affirmative defense of statute of limitations.

We review the dismissal of a complaint without leave to amend de novo. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990).

Section 1981 protects the rights of all persons, regardless of race, "to make and

enforce contracts." 42 U.S.C. § 1981 (1988). In Patterson v. McLean Credit Union, the Supreme Court redefined the scope of section 1981, finding that it protects just two rights: (1) the right to make contracts, and (2) the right to enforce contracts. Patterson 109 S.Ct. at 2372. The right to make contracts "extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment." Id. at 2372-73. Section 1981's guarantee of the right to enforce contracts serves to:

> prohibit[] discrimination that infects the legal process in ways that prevent one from enforcing contract rights [and] also covers wholly private efforts to impede access to the courts or obstruct non-judicial methods of adjudicating disputes about the force of binding obligations, as well as discrimination by private entities, such as labor unions, in enforcing the terms of a contract.

Id. at 2373. However, the right to enforce contracts does not extend beyond "conduct by an employer which impairs an employee's

ability to enforce through legal process his or her established contract rights." Id.

Here, Clarke claims intentional discrimination on the basis of race as a result of eleven incidents. Clarke's first cause of action involves his reassignment from a sales area which included the northwestern suburbs of Chicago, a middle-class, predominantly black community, to the south side of Chicago, a predominantly black community. Clarke alleges that the reassignment was racially motivated. Clarke's second cause of action involves the decision to close down the Great Lakes Territory and reassign Clarke to an area encompassing a predominantly black community in New York City. Clarke alleges that these decisions were racially motivated. Clarke's third cause of action involves the appellees' alleged refusal to allow Clarke to transfer to one of the other open positions, again allegedly on the ground of race. Clarke's fourth cause of

action involves appellee's allegedly racially motivated giving of inaccurate and incomplete information regarding relocation assistance available to Loma Linda Foods employees. Clarke's fifth cause of action involves appellees' allegedly racially motivated decision to require Clarke to be present in his new position in New York City by June 3, 1985, on the threat of termination. Clarke's sixth through tenth causes of action repeat the allegations of the first five and assert additionally that these racially motivated actions impaired Clarke's right to make and enforce sales contacts in his work as a sales representative for Loma Linda Foods. Clarke's eleventh cause of action involves appellees' retrieval of the company car and product samples that were in Clarke's possession after he had been terminated. Clarke alleges that these actions were racially motivated and impaired his right to make and enforce sales contracts in his work as a sales

representative for Loma Linda Foods.

We conclude that the conduct about which Clarke complains is not protected by section 1981. Clarke does not contend that Loma Linda Foods or other named defendants prevented him from entering into a contract; indeed, it is clear from the face of Clarke's complaint that he was an employee of Loma Linda Foods. Rather, his complaints concerning the reassignment, transfer, refusal to allow him to transfer to a different territory, provision of inaccurate information concerning transfer, an the "constructive termination" all involve postformation conduct. As such, these complaints are not protected by section 1981. Id. at 2372-72; Overby v. Chevron USA, Inc., 884 F.2d 470, 473 (9th Cir. 1989).

Nor does Clarke allege that appellees have impaired his ability to enforce his contract through the legal process or through any non-judicial method of adjudication. Clarke's contentions that appellees refused to

allow him to transfer to one of the two other open positions and provided him with inaccurate and incomplete information regarding relocation assistance available to Loma Linda Foods employees do not implicate his right of access to the courts. The Court in Patterson v. McLean Credit Union expressly held that alleged racial harassment that amounts to a breach of contract does not impair an employee's right to enforce his contract under section 1981. Patterson, 109 S.Ct. at 2376. Clarke does not charge that the appellees impeded his efforts to file any claims against them. Instead, as was the case in Overby, Clarke was free to and did pursue his claims of racial discrimination with the diligence he deemed appropriate. Overby, 884 F.2d at 473. Hence, we conclude that Clarke's complaints do not involve his right to enforce his employment contract under section 1981.

Clarke attempts to escape the strictures of Patterson v. McLean Credit Union, however,

by alleging that the allegedly racially actions taken by the appellees deprived him of his right to make and enforce sales contracts in his work as a sales representative for Loma Linda Foods. We reject this contention. Clarke was not a party to the contracts he made as a sales representative for Loma Linda Foods and therefore cannot claim that his rights to make these contracts were impaired by appellees' alleged discriminatory acts.

Accordingly, we affirm the district court's dismissal of Clarke's second amended complaint on the ground that it does not state a claim under section 1981 as construed by the Supreme Court in Patterson v. McLean Credit Union.[2]

IV. Default Judgment

Clarke next contends the district court

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[2] We do not reach Clarke's contention that the Supreme Court wrongly decided Patterson v. McLean Credit Union. Only the Supreme Court can overrule one of its precedents. Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533, 535 (1983).

erred by denying this motion for default judgment under Fed. R. Civ. P. 55(b)(2). The district court denied Clarke's motion for default judgment on the ground that Clarke had not secured an entry of default as required by Fed. R. Civ. P. 55(a). The district court also stated that Local Rule 14.12 required a party moving for a default judgment to state in declaration when and against whom the Clerk's default was entered. Clarke maintains that his motion for default judgment sought not only a default judgment but also the prerequisite entry of default as well. In Draper v. Coombs, 792 F.2d 915 (9th Cir. 1986), we considered a similar situation in which an answer, though late, was filed on the same day as plaintiff's motion for a default judgment. We held that because plaintiff had not made a showing of prejudice as a result of the "failure to comply strictly" with the time requirements of the Federal Rules of Civil Procedure, we could not conclude that the

district court had abused its discretion by denying the motion. Id. at 924-25. Here, Loma Linda Foods timely responded to Clarke's second amended complaint by filing a motion to dismiss on October 4, 1989. See Fed. R. Civ. P. 6(e). The other named defendants joined in Loma Linda Food's motion to dismiss on October 9, 1989. Clarke filed his motion for default judgment on October 17, 1989. Clarke has made no showing of prejudice. Under these circumstances, we cannot conclude that the district court abused its discretion by denying motion for a default judgment.

V. Sanctions

Finally, Clarke contends that the district court erred by denying his motion for sanctions against the defendants for failure to prepare for trial. We reject this contention. We review the denial of a motion for sanctions for an abuse of discretion. Mackey v. Pioneer Nat. Bank, 867 F.2d 520, 526 (9th Cir. 1989). On the record before us, we

find that the district court did not abuse its discretion in denying the motion for sanctions.

AFFIRMED.

DATE FILED (STAMPED): May 28, 1991

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERNEST L. CLARKE,	)	
	)	No. 90-55284
Plaintiff-Appellant,	)	
	)	D.C. No. CV-88-1403-RB
v.	)	
	)	
LOMA LINDA FOODS, INC.; LARRY BOGGESS, TED O. COOK; NABIL RAZZOUK; ADAM SCHLERETH; and JAMES SMEENGE,	)	ORDER
Defendants-Appellees.	)	

Before: NORRIS, LEAVY, and TROTT, Circuit Judges.

The petition for rehearing is DENIED.

DATE FILED (STAMPED): July 9, 1991

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

ERNEST L. CLARKE, *Petitioner*,

v.

LOMA LINDA FOODS, INC., LARRY BOGGESS, TED O. COOK, NABIL RAZZOUK, ADAM SCHLERETH, and JAMES SMEENGE, *Respondents*.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 1991, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid to all parties required to be served, as follows:

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Supreme Court, U.S.
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(2)

No. 91-786

In the Supreme Court of the United States

October Term, 1991

ERNEST L. CLARKE,

Petitioner,

v.

LOMA LINDA FOODS, INC., LARRY BOGGESS, TED O. COOK, NABIL RAZZOUK, ADAM SCHLERETH, and JAMES SMEENGE,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

1. May a plaintiff-employee who has failed to allege: (1) the existence of an internal administrative procedure to address a grievance with his employer under an employment contract; (2) any attempt on his part to comply with such a procedure; or (3) any interference by the defendant-employer with such an attempt raise, for the first time on petition for certiorari to this Court, a claim that there has been an impairment of his right to enforce his employment contract under 42 U.S.C. § 1981?

2. Does the language of 42 U.S.C. § 1981, "make and enforce contracts," extend to prospective agreements a sales employee may enter with customers on behalf of his employer?

3. May one who voluntarily abandons his employment duties maintain an action pursuant to 42 U.S.C. § 1981 against his employer for racially motivated discharge?

4. Does plaintiff's complaint in the Federal District Court of California, Central District, state a cause of action upon which relief can be granted under 42 U.S.C. § 1981 given the one-year statute of limitations set forth in California Code of Civil Procedure, section 340, subdivision (3)?

LIST OF PARTIES

Petitioner: Ernest L. Clarke, an individual, Plaintiff-Appellant, *Clarke v. Loma Linda Foods Inc., et al.*, United States Court of Appeal No. 90-55284, United States District Court No. CV-88-1403-RB(Ex).

Respondents: LOMA LINDA FOODS, INC., a corporation, Defendant-Appellee, *Clarke v. Loma Linda Foods Inc., et al.*, United States Court of Appeal No. 90-55284, United States District Court No. CV-88-1403-RB(Ex).

LARRY BOGGESS, an individual, Defendant-Appellee, *Clarke v. Loma Linda Foods Inc., et al.*, United States Court of Appeal No. 90-55284, United States District Court No. CV-88-1403-RB(Ex).

TED O. COOK, an individual, Defendant-Appellee, *Clarke v. Loma Linda Foods Inc., et al.*, United States Court of Appeal No. 90-55284, United States District Court No. CV-88-1403-RB(Ex).

TED O. COOK, an individual, Defendant-Appellee, *Clarke v. Loma Linda Foods, Inc., et al.*, United States Court of Appeal No. 90-55284, United States District Court No. CV-88-1403-RB(Ex).

NABIL RAZZOUK, an individual, Defendant-Appellee, *Clark v. Loma Linda Foods, Inc., et al.*, United States

Court of Appeal No. 90-55284, United States District Court No. CV-88-1403-RB(Ex).

ADAM SCHLERETH, an individual, Defendant-Appellee, Clark v. Loma Linda Foods, Inc., et al., United States Court of Appeal No. 90-55284, United States Court No. CV88-1403-RB(Ex).

JAMES SMEENGE, an individual, Defendant-Appellee, *Clark v. Loma Linda Foods, Inc., et al.*, United States Court of Appeal No. 90-55284, United States Court No. CV88-1403-RB(Ex).

Petitioner's complaint alleges the individuals were agents of the corporation, LOMA LINDA FOODS, INC. The parent corporation to LOMA LINDA FOODS, INC. is presently Nutricia Corporation. There are no subsidiaries of LOMA LINDA FOODS, INC. which are not wholly owned.

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No. 91-786

In the Supreme Court of the United States

October Term, 1991

ERNEST L. CLARKE,

Petitioner,

v.

LOMA LINDA FOODS, INC., LARRY BOGGESS, TED O. COOK, NABIL RAZZOUK, ADAM SCHLERETH, and JAMES SMEENGE,

Respondents.

BRIEF IN OPPOSITION TO PETITION

Respondent LOMA LINDA FOODS, INC. ("LOMA LINDA") hereby submits its brief in opposition to the petition for writ of certiorari filed by ERNEST L. CLARKE seeking review of the Ninth Circuit Court of Appeals decision rendered in this matter May 28, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit issued May 28, 1991 is an unreported memorandum decision. By footnote, the opinion provides it is not appropriate for publication. At 933 F.2d 1013 the case name and number are merely listed among those

not suitable for publication as a part of the table of Decisions Without Published Opinions.

The opinion of the district court is contained in the Appendix to this brief at pages 25 through 43 thereof.

JURISDICTION

LOMA LINDA FOODS, INC. takes no issue with the statement of jurisdiction set forth in the petition.

CONSTITUTIONAL PROVISIONS AND STATUTES

In addition to the statutory provisions set forth in the petition, the following statute of California is involved, California Code of Civil Procedure, section 340, subdivision (3), the statute of limitations for personal injury actions:

> "Within one year:
>
> . . .
>
> (3) An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another. . ."

INTRODUCTION

Review of the petition for certiorari demonstrates CLARKE presents no issue of federal law not settled by this Court and reveals the Ninth Circuit opinion neither conflicts with decisions of this Court nor creates a conflict in decisions between the circuits. In fact, the petition itself makes no claim to the contrary. CLARKE merely seeks one more level of judicial review of the facts which precipitated his decision not to continue his employment. Consequently, the petition fails to meet

the criteria necessary for review by petition for writ of certiorari set forth in the rules of this Court as well as the decisional law and merits no consideration.

STATEMENT OF THE CASE

CLARKE's initial complaint filed June 2, 1987, in the United States District Court for the Northern District of Illinois, Eastern Division, was transferred to the Central District of California February 25, 1988. (Respondent's Appendix ["Resp. App."] B-3.) Following motions to dismiss, CLARKE filed his second amended complaint with leave of court on September 11, 1989. In addition to LOMA LINDA, that complaint named Larry Boggess, Ted O. Cook, Nabil Razzouk, Adam Schlereth and James A. Smeenge, individually. It also alleged the individual defendants acted as agents of LOMA LINDA. The complaint sought damages based on asserted violations of 42 U.S.C. § 1981 only. (Resp. App. A-1 through 21.)

On January 8, 1990 pursuant to the motion of LOMA LINDA, joined by the individual defendants, the district court dismissed CLARKE's action for failure to state a claim upon which relief could be granted in accord with Federal Rules of Civil Procedure Rule 12(b)(6). (Resp. App. B-16.) The court found that the action was barred by the one-year statute of limitations, California Code of Civil Procedure, section 340, subdivision (3), and that under *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) CLARKE could not state a claim upon which relief could be granted.

CLARKE appealed the district court's decision to the Ninth Circuit. By its unpublished opinion of May 28, 1991, the Ninth Circuit affirmed the district court order

of dismissal without addressing the statute of limitations issue. (App. 2-18.)

STATEMENT OF FACTS

The complaint alleges CLARKE, a black Jamaican-American, was employed by LOMA LINDA as a sales representative beginning September, 1982 in the company's Great Lakes territory which encompassed Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin. (Resp. App. A-4.) In March of 1985, LOMA LINDA began to carry out a corporate restructuring plan, under which personnel relocations would be necessary, but contemplated no employee layoffs as a result of the plan. (District Court Docket no. 66, p.6) Later in March LOMA LINDA informed CLARKE the Great Lakes territory would be closed and he, along with other staff, would need to be reassigned to other areas of the country. (Resp. App. A-6) On April 18, 1985, CLARKE was informed his new territory would be centered in New York. (Resp. App. A-6.)

CLARKE refused to report to his newly assigned sales territory. He was advised he would be required to be in his reassigned territory June 3, 1985 in order to continue his employment. CLARKE decided not to make the move. (Resp. App. A-2) Based on CLARKE's decision not to accept reassignment, his employment did not continue beyond June 3, 1985. (Resp. App. A-2, 11) CLARKE was an employee of LOMA LINDA throughout the time period alleged in the complaint. (Resp. App. A-4) His reassignment was solely geographical and involved no new job responsibilities. (Resp. App. A-6) The complaint asserts no conduct on the part of LOMA LINDA after June 4, 1985. (Resp. App. A-6 through 11)

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS FAILED TO ESTABLISH ANY GROUND REQUIRED BY THIS COURT FOR ISSUANCE OF A WRIT OF CERTIORARI.

The rule is clear that "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." (Sup. Ct. R. 10.1) Rule 10.1 sets forth the factors this Court considers in evaluating a petition for writ of certiorari. Among those factors are whether a circuit court of appeals of the United States has: rendered a decision in conflict with the decision of another circuit court on the same matter (Sup. Ct. R. 10.1(a)); decided an important question of federal law which has not been, but should be, settled by this Court (Sup. Ct. R. 10.1(c)); or decided a federal question in a way that conflicts with applicable decisions of this Court (Sup. Ct. R. 10.1(c)). This Court has forcefully expressed it will grant certiorari only "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *National Labor Relations Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502, 71 S.Ct. 453 (1951). Yet, in this case involving an unpublished opinion, CLARKE's petition has demonstrated no ground for issuance of a writ of certiorari.

CLARKE's first stated reason for grant is styled "[the Ninth Circuit] Failed To Give Due Emphasis To The Fact That The Primary Focus Of The *Patterson* Case

Is The 'Contract' Aspect of 42 U.S.C. § 1981. . ." (Pet., p. 5.) However, substantive review of the briefing which follows that heading reveals no discussion of any manner in which the Ninth Circuit opinion conflicts with this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. at 180 or any other opinion of this Court. On appeal to the Ninth Circuit, CLARKE argued *Patterson* had been wrongly decided, despite the fact that, as recognized by the Court of Appeals, it remained binding authority which that court could not alter. (App. 15, n.2) There is no question that the Ninth Circuit properly applied the *Patterson* case as decided by this Court to the facts of this case.[1] While CLARKE proceeds to assert "there is some genuine inconsistency and confusion in the lower courts, especially at the trial court level, on the application of *Patterson*," (Pet. p. 7), he makes no reference to any circuit court cases which are in conflict.

Petitioner's second "reason for grant" asserts that by virtue of the Ninth Circuit opinion and *Patterson*, employers are granted immunity from suit when they impair the right of an employee to make sales contracts.

---

[1]CLARKE does not address the impact of the Civil Rights Act of 1991 (Pub. L. 102-166) on the issues in this case. While the act will have the effect of overruling some aspects of the *Patterson* decision, that circumstance does not diminish the validity of the result reached in this case in light of the issues addressed in sections II, III and IV of this brief. Furthermore, as discussed more fully in section V of this brief, the dismissal of CLARKE's action is mandated based solely on the applicable statute of limitations. Under this Court's decision in *Goodman v. Lukens Steel*, 483 U.S. 656, 661-62, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987), California's one year statute of limitations was appropriately applied. Consequently, arguments based on the effect of the Civil Rights Act of 1991 on *Patterson*, or the effect of that act upon any other substantive liability theory under 42 U.S.C. § 1981 are moot.

(Pet., p. 9.) However, the present case involves no such "immunity" from suit. The only claims pled in the complaint were based on 42 U.S.C. § 1981. Thus, the opinion in no way abridges other potential claims for relief whether state or federal. As *Patterson* explicitly recited, claims such as those in that case, like those in the present case, are more appropriately asserted as employment discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., than under § 1981 which is more limited. *Patterson v. McLean Credit Union*, 491 U.S. at 180. In addition, this circumstance demonstrates the consistency of the Ninth Circuit opinion with the decisional law of this Court and the other circuit courts rather than evidences any reason for grant. Moreover, as discussed more fully in section III of this brief, the ability of an employee to make sales contracts is not the kind of right protected by § 1981.

CLARKE's third and final purported reason for grant is entirely factual. Such a contention provides no basis for this Court to review the decision of the Ninth Circuit. This Court will not review mere conflicts in the evidence. *National Labor Relations Board v. Pittsburgh S.S. Co.*, 340 U.S. at 503. As a part of his factual reason for grant, CLARKE mentions four district court rulings which he avers were incorrect, but makes not a single argument as to why any of them was wrongly decided and cites no authority whatsoever. (Pet., p. 10-12)

II.

CLARKE'S COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED IN THAT IT CONTAINS NO ALLEGATIONS LOMA LINDA INTERFERED WITH HIS RIGHT TO USE LEGAL PROCESS TO ENFORCE HIS EMPLOYMENT CONTRACT.

Patterson made it clear that the right to enforce a contract protected by 42 U.S.C. § 1981 is one's right to use legal process to enforce that contract. *Patterson v. McLean Credit Union*, 491 U.S. at 177. Examination of the complaint, however, demonstrates that it nowhere alleges any grievance procedure adopted by LOMA LINDA, any attempt by CLARKE to redress his grievances with LOMA LINDA through any such process, or any attempt by CLARKE to redress that grievance by any other legal process. The complaint is further fatally defective in that it contains no allegations as to any manner in which LOMA LINDA interfered with or frustrated CLARKE in an attempt to avail himself of a company grievance process or other form of legal process. At the very least, a violation of § 1981 for interference with the right to enforce a contract must allege that there was some interference with the plaintiff's access to legal process. *Id.* The complaint is entirely silent on these issues.

Complaints which rely on federal civil rights statutes are plainly insufficient unless they contain specific allegations of fact indicating a deprivation of civil rights, rather than state simple conclusions. *Koch v. Yunich*, 533 F.2d 80, 85 (CA2 1976); *Powell v. Jarvis*, 460 F.2d 551, 558 (CA2 1972); *Kauffman v. Moss*, 420 F.2d 1270,

1275 (CA3), cert. denied, 400 U.S. 846, 91 S.Ct. 93, 27 L.Ed.2d. 84 (1970); *Powell v. Workmen's Compensation Board of The State of New York*, 327 F.2d 131, 137 (CA2 1964); *Trader v. Fiat Distributors, Inc.*, 476 F.Supp. 1194, 1197-98 (D. Del. 1979); *Gauvin v. Trombatore*, 682 F.Supp. 1067, 1071 (N.D. Cal. 1988). The actual allegations contained in the complaint recite plaintiff "complained" to "superiors" of one of the individual defendants, but "received no remedy or relief"; plaintiff "attempted to negotiate with defendants . . . but his efforts were ignored or rebuffed;" "defendants refused to engage in good faith discussions of the terms and conditions associated" with other positions; defendants "gave plaintiff inaccurate and incomplete information regarding relocation assistance policies and practices;" and defendants made "no further response" to plaintiff's citation to his difficulty in finding suitable, affordable housing. (Resp. App. A-5, 6-9, 11) Such assertions cannot be rationally construed to allege an employer's interference with an employee's access to legal process.

CLARKE, in blatant conflict with the actual allegations contained in his complaint, states in his petition he was "frustrated" in his "attempts to access the internal grievance process." Even if such an allegation were truly contained in the complaint, it would be insufficient to state the necessary element of a § 1981 claim, interference with access to legal process. A plaintiff must allege specific facts to state a federal civil rights claim; mere conclusory allegations are insufficient. *Id.*

III.

42 U.S.C. § 1981 DOES NOT EXTEND TO THE RIGHT OF AN EMPLOYEE TO MAKE SALES CONTRACTS WITH CUSTOMERS OF HIS EMPLOYER.

CLARKE's novel suggestion, without citation to authority in law, or support in reason, that 42 U.S.C. § 1981 protects his right to make sales contracts on behalf of his employer (Pet., p. 9.) was properly rejected by the Ninth Circuit as without merit. As the Ninth Circuit opinion expressly held, the claimed "right" of an employee to make sales contracts is clearly not the kind of right embodied in § 1981. (App. 15.) It is axiomatic that, regardless of race, one may only enforce contracts to which he is a party. *Williams v. Eggleston*, 170 U.S. 304, 3.09 18 S.Ct. 617, 42 L.Ed. 1047 (1898); 12A Am.Jur.2d Contracts § 425 (2nd ed. 1991). CLARKE himself makes no claim he was a contracting party with those to whom he sold LOMA LINDA food products.

IV.

CLARKE'S COMPLAINT FAILS TO ALLEGE FACTS TO SUPPORT A CLAIM OF RACIALLY MOTIVATED DISCHARGE.

The allegations of CLARKE's complaint acknowledge he chose not to report on June 3, 1985 to the sales territory newly assigned to him as a result of LOMA LINDA's business necessity to reorganize all of its sales territories. (App. 12) Thus, no discharge occurred in this case. In fact, Petitioner's brief on appeal to the Ninth Circuit, conceded his "employment with Loma Linda came to an end in June of 1985 as a result of conduct on the part of defendants that made it impractical for

him to continue." ("Brief of Appellant," p. 17.) Such a claim cannot reasonably be construed to be a discharge because of race. Instead it demonstrates the actual nature of the facts here: CLARKE no longer works for LOMA LINDA through his own choice.

An employee's decision that a transfer is not economically advantageous or is perceived by him to be impractical does not amount to a discharge, direct or constructive. A constructive discharge must be based on objective criteria that would create intolerable conditions a reasonable person could not be expected to bear. *Yates v. Avco Corp.*, 819 F.2d 630, 636-37 (CA6 1987); *Darnell v. Campbell County Fiscal Court*, 731 F.Supp. 1309, 1312-13 (E.D.Ky. 1990). Therefore, despite CLARKE's contention that racially motivated discharge is compensable under 42 U.S.C. § 1981 subsequent to *Patterson* in reliance on *Hicks v. Brown Group, Inc.*, 402 F.2d 630 (CA8 1990), the pleadings of the instant case provide no basis to address that issue.

V.

CLARKE'S CLAIMS BASED UPON 42 U.S.C. § 1981 ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

Where venue of an action is transferred between districts, the law of the state in which the transferree district sits is applied with regard to statute of limitations issues. *LaVay Corp. v. Dominion Federal Sav. & Loan Ass'n*, 830 F.2d 522, 526 (CA4 1987), cert. den., 484 U.S. 1065, 108 S.Ct. 1027, 98 L.Ed.2d. 991 (1988); *Nelson v. International Paint Co.*, 716 F.2d 640, 643 (CA9 1983). This prevents plaintiffs from filing suits in inappropriate forums in order to gain the advantage of that forum's law. *Lavay*, 830 F.2d at 526.

The district court correctly concluded California's one-year statute of limitations set out in Code of Civil Procedure, section 340, subdivision (3) was applicable under this Court's decision in *Goodman v. Lukens Steel Co.*, 483 U.S. 656, 661-62, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987). *Goodman* held the statute of limitations to be applied to cases filed under 42 U.S.C. § 1981 is the same as that to be applied to 42 U.S.C. § 1983 actions. *Id.* at 660. Applying the rule of *Wilson v. Garcia*, 471 U.S. 261, 266-68, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), this Court held in *Goodman* that where there is more than one potentially applicable statute of limitations, the civil rights statutes require federal courts to apply the state personal injury statute of limitations. *Goodman*, 482 U.S. at 661. This is the same rule the Ninth Circuit has applied since 1980. *Bratton v. Bethlehem Steel Corp.*, 649 F.2d 658, 663 (CA9 1980). Given that the last wrongful acts alleged against LOMA LINDA occurred prior to June 4, 1985 and the complaint was not filed until June 2, 1987, CLARKE's claims under § 1981 were time-barred approximately a year before the action was brought.

VI.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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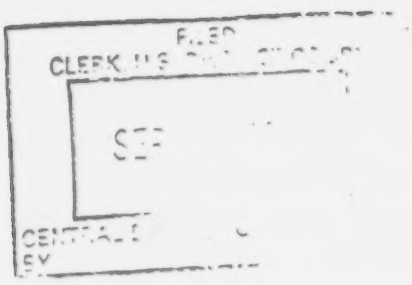
APPENDICES



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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ERNEST L. CLARKE, Plaintiff,	)	No. CV 88-1403 RB(Ex)
vs.	)	SECOND AMENDED
LOMA LINDA FOODS, INC., et al.,	)	COMPLAINT; DEMAND FOR JURY TRIAL
Defendants.	)	

FIRST CLAIM FOR RELIEF
(Racially Motivated Impairment of Contract
42 USC, Section 1981)

Plaintiff complains and alleges as follows:

NATURE OF THE CASE

1. This is an action brought by a sales representative, Ernest L. Clarke, against his former employer, Loma Linda Foods, Inc., and against Larry Boggess, Ted O.

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Cook, Nabil Razzouk, Adam Schlereth, and James A. Smeenge, both individually and in their capacity as agents of said former employer. Plaintiff alleges that said defendants intentionally discriminated against him on the basis of his race (black), that he was compelled to sell only to black customers pursuant to company policy, and that he was later fired when he found it economically too burdensome to comply with said policy of defendant Loma Linda Foods, Inc. This racially motivated conduct was referred to as wrongful termination in plaintiff's Section 1981 claim in his First Amended Complaint filed more than a year before the United States rendered their decision in *Patterson v. McLean Credit Union*, ___ U.S. ___, 109 S.Ct. 2363 (decided June 15, 1989). *Patterson* held that Section 1981 is applicable only to racially motivated conduct that impairs the making and enforcing of contracts. With a slight change in focus, but no material change in the underlying facts, this Second Amended Complaint reveals that the *Patterson* decision has no material impact on plaintiff's cause of action. The facts underlying plaintiff's claim of wrongful termination as well as his pendant claims of breach of contract, intentional interference with contract, and intentional infliction of emotional distress, show racially motivated conduct on the part of the defendants which impaired plaintiff's right to make and enforce contracts in violation of Section 1981.

Furthermore, the facts alleged by plaintiff herein, many of which are already admitted to by defendants, constitute a separately distinguishable basis for plaintiff's cause of action under Section 1981, post-*Patterson*. The plaintiff in *Patterson* was an office worker. Plaintiff in the instant case was a sales representative and, as such, it was the very nature of his business to make contracts

for the sale of infant formula and other products manufactured or distributed by defendant Loma Linda Foods, Inc. This means that racially motivated conduct of any kind that impaired his ability to make and enforce sales contracts on the same basis as a white citizen is actionable under Section 1981. Such conduct includes constructive termination, breach of contract, intentional interference with contract, intentional infliction of emotional distress, and any other such conduct.

Plaintiff seeks money damages for lost wages and benefits, liquidated, compensatory and punitive damages, and injunctive and declaratory relief, including an order requiring defendant Loma Linda Foods, Inc., to modify its practices and policies which result in unlawful discrimination based on race.

JURISDICTION

2. Jurisdiction over this action is based upon Title 28, USC Section 1331 (federal question), and Title 42 USC Section 1981. Section 1981 states:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

PLAINTIFF

3. Plaintiff was one of two sales representatives in the Great Lakes sales territory of defendant Loma Linda Foods, Inc., at the time his employment was terminated

on June 3, 1985. He had worked for defendant since September of 1982. He was one of only two black sales representatives out of the approximately 100 such positions maintained by Loma Linda Foods, Inc., nationwide.

DEFENDANTS

4. Defendant Loma Linda Foods, Inc., is a business corporation incorporated in the State of California, with its principal place of business also in California. It was at all relevant times a wholly-owned subsidiary of the Seventh-day Adventist Church, a Maryland non profit corporation, and shared a large body of policies and practices with this its parent church organization. During the time period covering the events cited in this complaint, the individual defendants were all employees of Loma Linda Foods, Inc., with various corporate, administrative and managerial titles and responsibilities.

5. On or about September 1, 1982, plaintiff was employed by defendant Loma Linda Foods as a sales representative for its Great Lakes Territory, which territory included the states of Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.

6. All pre-employment interviews decisions and commitments to hire plaintiff were conducted in Illinois, including an interview with the president of defendant Loma Linda Foods.

7. Plaintiff's initial sales area was the northwestern suburbs of Chicago, a middle to upper class white community.

8. On a date certain that plaintiff does not now recall defendant Ted O. Cook met in Chicago with plaintiff and the other Chicago area sales representative (a white male) and, after an extensive review of sales activities

and records, decided to immediately reassign plaintiff to the south side of Chicago, a predominantly black community, for the reason, as expressly stated by defendant Cook, that blacks should only sell to blacks.

9. Plaintiff was immediately reassigned to the south side of Chicago despite his strenuous objections to the transfer, citing the blatantly racist basis for the transfer, and his outstanding sales record in his non-black territory. These racially motivated acts of defendant imposed new contract terms and conditions on plaintiff and thus impaired plaintiff's right to make and enforce his employment contract with defendants in violation of Section 1981.

10. Plaintiff complained to defendant Cook's superiors but received no remedy or relief.

11. As a proximate result of defendants' discrimination against plaintiff, plaintiff has sustained and continues to sustain substantial losses in earnings and other employment benefits. Plaintiff is thus entitled to recover compensatory damages from defendants in an amount according to proof.

12. Defendants did the acts alleged herein maliciously, fraudulently and oppressively and with the wrongful intention of injuring plaintiff and with an improper and evil motive amounting to malice. Plaintiff has suffered and continues to suffer humiliation and mental anguish, all to his damage, and is thus entitled to recover punitive damages from defendants in an amount according to proof.

WHEREFORE, plaintiff requests judgment against said defendants jointly and severally for compensatory damages in the amount of Six Hundred Twenty Thousand Dollars ($620,000.00) or according to proof,

and for exemplary and punitive damages in the amount of Nine Hundred Thousand Dollars ($900,000.00) or according to proof; for an order requiring defendant Loma Linda Foods, Inc., to modify its practices and policies which result in unlawful discrimination based on race; all together with the costs of this action, statutory attorneys' fees pursuant to 42 USC, Section 1988; and such other relief both legal and equitable, as the Court deems just.

SECOND CLAIM FOR RELIEF

(Racially Motivated Impairment of Contract 42 USC, Section 1981)

1-7 The allegations of paragraphs 1 through 7 of the hereinabove First Claim for Relief are realleged and incorporated herein by reference.

8. On or about March 25, 1985, defendant Loma Linda Foods announced its plan to close down its Great Lakes Territory and reassign staff (this would include plaintiff) to other areas of the country, leaving the specific details to the regional managers.

9. On or about April 18, 1985, defendant Adam Schlereth, then district manager of the Northeastern Region of defendant Loma Linda Foods, Inc., called plaintiff from Connecticut to say that he had consulted with defendant James Smeenge, his predecessor in the northeast, and they had decided that plaintiff would be transferred to a predominantly black community in New York City. This was confirmed by plaintiff in a telephone conversation with defendant James Smeenge at his new location in Florida. Plaintiff was told that this was due to a company policy of blacks selling only to blacks. Plaintiff attempted to negotiate with defendants the changed terms and conditions associated with the

position in New York City, citing in particular the high cost of housing, but these efforts were ignored or rebuffed. These racially motivated acts of defendants impaired plaintiff's right to make and enforce employment contracts with defendants in violation of Section 1981.

10. As a proximate result of defendants' discrimination against plaintiff, plaintiff has sustained and continues to sustain substantial losses in earnings and other employment benefits. Plaintiff is thus entitled to recover compensatory damages from defendants in an amount according to proof.

11. Defendants did the acts alleged herein maliciously, fraudulently and oppressively and with the wrongful intention of injuring plaintiff and with an improper and evil motive amounting to malice. Plaintiff has suffered and continues to suffer humiliation and mental anguish, all to his damage, and is thus entitled to recover punitive damages from defendants in an amount according to proof.

WHEREFORE, plaintiff requests judgment against said defendants jointly and severally for compensatory damages in the amount of Six Hundred Twenty Thousand Dollars ($620,000.00) or according to proof, and for exemplary and punitive damages in the amount of Nine Hundred Thousand Dollars ($900,000.00) or according to proof; for an order requiring defendant Loma Linda Foods, Inc., to modify its practices and policies which result in unlawful discrimination based on race; all together with the costs of this action, statutory attorneys' fees pursuant to 42 USC, Section 1988; and such other relief, both legal and equitable, as the Court deems just.

THIRD CLAIM FOR RELIEF

(Racially Motivated Impairment of Contract 42 USC, Section 1981)

1-8. The allegations of paragraphs 1 through 8 of the hereinabove Second Claim for Relief are realleged and incorporated herein by reference.

9. On or about April 18, 1985, defendant Adam Schlereth, then district manager of the Northeastern Region of defendant Loma Linda Foods, Inc., called plaintiff from Connecticut to say that he had consulted with defendant James Smeenge, his predecessor in the northeast and they had decided that plaintiff would be transferred to a predominantly black community in New York City, clearly suggesting that it would be better for a black person to try to develop sales opportunities for the company in the targeted community. Plaintiff expressed to defendants his interest in two other open positions, including a position in San Diego, California, but defendants refused to engage in good faith discussions of the terms and conditions associated with either position. Defendants' racially motivated refusal to consider plaintiff's requests to be considered for the two other open positions impaired plaintiff's right to make and enforce employment contracts with defendants in violation of Section 1981.

10. As a proximate result of defendants' discrimination against plaintiff, plaintiff has sustained and continues to sustain substantial losses in earnings and other employment benefits. Plaintiff is thus entitled to recover compensatory damages from defendants in an amount according to proof.

11. Defendants did the acts alleged herein maliciously, fraudulently and oppressively and with the wrongful

intention of injuring plaintiff and with an improper and evil motive amounting to malice. Plaintiff has suffered and continues to suffer humiliation and mental anguish, all to his damage, and is thus entitled to recover punitive damages from defendants in an amount according to proof.

WHEREFORE, plaintiff requests judgment against said defendants jointly and severally for compensatory damages in the amount of Six Hundred Twenty Thousand Dollars ($620,000.00) or according to proof, and for exemplary and punitive damages in the amount of Nine Hundred Thousand Dollars ($900,000.00) or according to proof; for an order requiring defendant Loma Linda Foods, Inc., to modify its practices and policies which result in unlawful discrimination based on race, all together with the costs of this action, statutory attorneys' fees pursuant to 42 USC, Section 1988; and other relief, both legal and equitable, as the Court deems just.

FOURTH CLAIM FOR RELIEF

(Racially Motivated Impairment of Contract 42 USC, Section 1981)

1-8. The allegations of paragraphs 1 through 8 of the hereinabove Second Claim for Relief are realleged and incorporated herein by reference.

9. On or about May 1, 1985, and again on or about May 13, 1985, defendants Nabil Razzouk, Adam Schlereth and Ted O. Cook intentionally and for racial reasons, gave plaintiff inaccurate and incomplete information regarding relocation assistance policies and practices of defendant Loma Linda Foods, Inc. Said racially motivated acts of said defendants impaired plaintiff's right to make and enforce contracts of

employment with defendants in violation of Section 1981.

10. As a proximate result of defendants' discrimination against plaintiff, plaintiff has sustained and continues to sustain substantial losses in earnings and other employment benefits. Plaintiff is thus entitled to recover compensatory damages from defendants in an amount according to proof.

11. Defendants did the acts alleged herein maliciously, fraudulently and oppressively and with the wrongful intention of injuring plaintiff and with an improper and evil motive amounting to malice. Plaintiff has suffered and continues to suffer humiliation and mental anguish, all to his damage, and is thus entitled to recover punitive damages from defendants in an amount according to proof.

WHEREFORE, plaintiff requests judgment against said defendants jointly and severally for compensatory damages in the amount of Six Hundred Twenty Thousand Dollars ($620,000.00) or according to proof, and for exemplary and punitive damages in the amount of Nine Hundred Thousand Dollars ($900,000.00) or according to proof; for an order requiring defendant Loma Linda Foods, Inc., to modify its practices and policies which result in unlawful discrimination based on race, all together with the costs of this action, statutory attorneys' fees pursuant to 42 USC, Section 1988; and other relief, both legal and equitable, as the Court deems just.

FIFTH CLAIM FOR RELIEF

(Racially Motivated Impairment of Contract 42 USC, Section 1981)

1-8. The allegations of paragraphs 1 through 8 of the hereinabove Second Claim for Relief are realleged and incorporated herein by reference.

9. On or about May 21, 1985, defendant Nabil Razzouk, pursuant to the policy and practice of requiring blacks to only sell to blacks, issued an ultimatum to plaintiff to be physically present at his new position in New York City by June 3, 1985, or his employment would be terminated.

10. Plaintiff responded citing, among other things, his difficulty in finding suitable, affordable housing in New York City. There was no further response from defendant Loma Linda Foods, Inc., except as to the details of plaintiff's termination such as payment for accumulated unpaid vacation hours.

11. Defendant's constructive termination of plaintiff was racially motivated and impaired plaintiff's right to make and enforce contracts of employment with defendants in violation of Section 1981.

12. As a proximate result of defendants' discrimination against plaintiff, plaintiff has sustained and continues to sustain substantial losses in earnings and other employment benefits. Plaintiff is thus entitled to recover compensatory damages from defendants in an amount according to proof.

13. Defendants did the acts alleged herein maliciously, fraudulently and oppressively and with the wrongful intention of injuring plaintiff and with an improper and evil motive amounting to malice. Plaintiff has suffered

and continues to suffer humiliation and mental anguish, all to his damage, and is thus entitled to recover punitive damages from defendants in an amount according to proof.

WHEREFORE, plaintiff requests judgment against said defendants jointly and severally for compensatory damages in the amount of Six Hundred Twenty Thousand Dollars ($620,000.00) or according to proof, and for exemplary and punitive damages in the amount of Nine Hundred Thousand Dollars ($900,000.00) or according to proof; for an order requiring defendant Loma Linda Foods, Inc., to modify its practices and policies which result in unlawful discrimination based on race, all together with the costs of this action, statutory attorneys' fees pursuant to 42 USC, Section 1988; and other relief, both legal and equitable, as the Court deems just.

SIXTH CLAIM FOR RELIEF

(Racially Motivated Impairment of Contract 42 USC, Section 1981)

1-8. The allegations of paragraphs 1 through 8 of the hereinabove First Claim for Relief are realleged and incorporated herein by reference.

9. Plaintiff was immediately reassigned to the south side of Chicago despite his strenuous objections to the transfer, citing the blatantly racist basis for the transfer, and his outstanding sales record in his non-black territory. These racially motivated acts of defendant impaired plaintiff's right to make and enforce sales contracts in his work as a sales representative for defendant Loma Linda Foods, Inc., in violation of Section 1981.

10. As a proximate result of defendants' discrimination against plaintiff, plaintiff has sustained and continues to sustain substantial losses in earnings and other employment benefits. Plaintiff is thus entitled to recover compensatory damages from defendants in an amount according to proof.

11. Defendants did the acts alleged herein maliciously, fraudulently and oppressively and with the wrongful intention of injuring plaintiff and with an improper and evil motive amounting to malice. Plaintiff has suffered and continues to suffer humiliation and mental anguish, all to his damage, and is thus entitled to recover punitive damages from defendants in an amount according to proof.

WHEREFORE, plaintiff requests judgment against said defendants jointly and severally for compensatory damages in the amount of Six Hundred Twenty Thousand Dollars ($620,000.00) or according to proof, and for exemplary and punitive damages in the amount of Nine Hundred Thousand Dollars ($900,000.00) or according to proof; for an order requiring defendant Loma Linda Foods, Inc., to modify its practices and policies which result in unlawful discrimination based on race, all together with the costs of this action, statutory attorneys' fees pursuant to 42 USC, Section 1988; and other relief, both legal and equitable, as the Court deems just.

SEVENTH CLAIM FOR RELIEF

(Racially Motivated Impairment of Contract 42 USC, Section 1981)

1-7 The allegations of paragraphs 1 through 7 of the hereinabove First Claim for Relief are realleged and incorporated herein by reference.

8. On or about March 25, 1985, defendant Loma Linda Foods announced its plan to close down its Great Lakes Territory and reassign staff (this would include plaintiff) to other areas of the country, leaving the specific details to the regional managers.

9. On or about April 18, 1985, defendant Adam Schlereth, then district manager of the Northeastern Region of defendant Loma Linda Foods, Inc., called plaintiff from Connecticut to say that he had consulted with defendant James Smeenge, his predecessor in the northeast and they had decided that plaintiff would be transferred to predominantly black community in New York City. This was confirmed by plaintiff in a telephone conversation with defendant James Smeenge at his new location in Florida. Plaintiff was told that this was due to a company policy of blacks selling only to blacks. Plaintiff attempted to negotiate with defendants the changed terms and conditions associated with the position in New York City, citing in particular the high cost of housing, but these efforts were ignored or rebuffed. These racially motivated acts of defendants impaired plaintiff's right to make and enforce employment contracts with defendants in violation of Section 1981.

10. As a proximate result of defendants' discrimination against plaintiff, plaintiff has sustained and continues to sustain substantial losses in earnings and other employment benefits. Plaintiff is thus entitled to recover compensatory damages from defendants in an amount according to proof.

11. Defendants did the acts alleged herein maliciously, fraudulently and oppressively and with the wrongful intention of injuring plaintiff and with an improper and evil motive amounting to malice. Plaintiff has suffered

and continues to suffer humiliation and mental anguish, all to his damage, and is thus entitled to recover punitive damages from defendants in an amount according to proof.

WHEREFORE, plaintiff requests judgment against said defendants jointly and severally for compensatory damages in the amount of Six Hundred Twenty Thousand Dollars ($620,000.00) or according to proof, and for exemplary and punitive damages in the amount of Nine Hundred Thousand Dollars ($900,000.00) or according to proof; for an order requiring defendant Loma Linda Foods, Inc., to modify its practices and policies which result in unlawful discrimination based on race; all together with the costs of this action, statutory attorneys' fees pursuant to 42 USC, Section 1988; and such other relief, both legal and equitable, as the Court deems just.

EIGHTH CLAIM FOR RELIEF

(Racially Motivated Impairment of Contract 42 USC, Section 1981)

1-8 The allegations of paragraphs 1 through 8 of the hereinabove Second Claim for Relief are realleged and incorporated herein by reference.

9. On or about April 18, 1985, defendant Adam Schlereth, then district manager of the Northeastern Region of defendant Loma Linda Foods, Inc., called plaintiff from Connecticut to say that he had consulted with defendant James Smeenge, his predecessor in the northeast and they had decided that plaintiff would be transferred to predominantly black community in New York City, clearly suggesting that it would be better for a black person to try to develop sales opportunities for the company in the targeted community. Plaintiff

expressed to defendants his interest in two other open positions, including a position in San Diego, California, but defendants refused to engage in good faith discussions of the terms and conditions associated with either position. These racially motivated acts of defendant impaired plaintiff's right to make and enforce sales contracts in his work as a sales representative for defendant Loma Linda Foods, Inc., in violation of Section 1981.

10. As a proximate result of defendants' discrimination against plaintiff, plaintiff has sustained and continues to sustain substantial losses in earnings and other employment benefits. Plaintiff is thus entitled to recover compensatory damages from defendants in an amount according to proof.

11. Defendants did the acts alleged herein maliciously, fraudulently and oppressively and with the wrongful intention of injuring plaintiff and with an improper and evil motive amounting to malice. Plaintiff has suffered and continues to suffer humiliation and mental anguish, all to his damage, and is thus entitled to recover punitive damages from defendants in an amount according to proof.

WHEREFORE, plaintiff requests judgment against said defendants jointly and severally for compensatory damages in the amount of Six Hundred Twenty Thousand Dollars ($620,000.00) or according to proof, and for exemplary and punitive damages in the amount of Nine Hundred Thousand Dollars ($900,000.00) or according to proof; for an order requiring defendant Loma Linda Foods, Inc., to modify its practices and policies which result in unlawful discrimination based on race; all together with the costs of this action, statutory attorneys' fees pursuant to 42 USC, Section

1988; and such other relief, both legal and equitable, as the Court deems just.

NINTH CLAIM FOR RELIEF

(Racially Motivated Impairment of Contract 42 USC, Section 1981)

1-8 The allegations of paragraphs 1 through 8 of the hereinabove Second Claim for Relief are realleged and incorporated herein by reference.

9. On or about May 1, 1985, and again on or about May 13, 1985, defendants Nabil Razzouk, Adam Schlereth and Ted O. Cook intentionally and for racial reasons gave plaintiff inaccurate and incomplete information regarding relocation assistance policies and practices of defendant Loma Linda Foods, Inc. These racially motivated acts of defendant impaired plaintiff's right to make and enforce sales contracts in his work as a sales representative for defendant Loma Linda Foods, Inc., in violation of Section 1981.

10. As a proximate result of defendants' discrimination against plaintiff, plaintiff has sustained and continues to sustain substantial losses in earnings and other employment benefits. Plaintiff is thus entitled to recover compensatory damages from defendants in an amount according to proof.

11. Defendants did the acts alleged herein maliciously, fraudulently and oppressively and with the wrongful intention of injuring plaintiff and with an improper and evil motive amounting to malice. Plaintiff has suffered and continues to suffer humiliation and mental anguish, all to his damage, and is thus entitled to recover punitive damages from defendants in an amount according to proof.

WHEREFORE, plaintiff requests judgment against said defendants jointly and severally for compensatory damages in the amount of Six Hundred Twenty Thousand Dollars ($620,000.00) or according to proof, and for exemplary and punitive damages in the amount of Nine Hundred Thousand Dollars ($900,000.00) or according to proof; for an order requiring defendant Loma Linda Foods, Inc., to modify its practices and policies which result in unlawful discrimination based on race, all together with the costs of this action, statutory attorneys' fees pursuant to 42 USC, Section 1988; and other relief, both legal and equitable, as the Court deems just.

TENTH CLAIM FOR RELIEF

(Racially Motivated Impairment of Contract 42 USC, Section 1981)

1-8 The allegations of paragraphs 1 through 8 of the hereinabove Second Claim for Relief are realleged and incorporated herein by reference.

9. By letter dated May 21, 1985, defendant Nabil Razzouk, pursuant to the policy and practice of requiring blacks to only sell to blacks, issued an ultimatum to plaintiff to be physically present at his new assignment in New York City by June 3, 1985, or his employment would be terminated.

10. Plaintiff responded citing, among other things, his difficulty in finding suitable, affordable housing in New York City. There was no further response from defendant Loma Linda Foods, Inc., except as to the details of plaintiff's termination such as payment for accumulated unpaid vacation hours.

11. Defendant's constructive termination of plaintiff was racially motivated and impaired plaintiff's right to

make and enforce sales contracts in his work as a sales representative for defendant Loma Linda Foods, Inc., in violation of Section 1981.

12. As a proximate result of defendants' discrimination against plaintiff, plaintiff has sustained and continues to sustain substantial losses in earnings and other employment benefits. Plaintiff is thus entitled to recover compensatory damages from defendants in an amount according to proof.

13. Defendants did the acts alleged herein maliciously, fraudulently and oppressively and with the wrongful intention of injuring plaintiff and with an improper and evil motive amounting to malice. Plaintiff has suffered and continues to suffer humiliation and mental anguish, all to his damage, and is thus entitled to recover punitive damages from defendants in an amount according to proof.

WHEREFORE, plaintiff requests judgment against said defendants jointly and severally for compensatory damages in the amount of Six Hundred Twenty Thousand Dollars ($620,000.00) or according to proof, and for exemplary and punitive damages in the amount of Nine Hundred Thousand Dollars ($900,000.00) or according to proof; for an order requiring defendant Loma Linda Foods, Inc., to modify its practices and policies which result in unlawful discrimination based on race, all together with the costs of this action, statutory attorneys' fees pursuant to 42 USC, Section 1988; and other relief, both legal and equitable, as the Court deems just.

ELEVENTH CLAIM FOR RELIEF

(Racially Motivated Impairment of Contract 42 USC, Section 1981)

1-8 The allegations of paragraphs 1 through 8 of the hereinabove Second Claim for Relief are realleged and incorporated herein by reference.

9. On June 4, 1985, defendant James Smeenge, in the company of a fellow employee of defendant Loma Linda Foods, Inc., appeared without notice or warning at plaintiff's home in Bolingbrook, Illinois, and in the presence of plaintiff's wife, children, house guests and neighbors, demanded in a loud and boisterous voice clearly intended to cause embarrassment and distress, that plaintiff give him the keys to plaintiff's company owned car. Defendant James Smeenge then without plaintiff's permission proceeded to load plaintiff's product samples from plaintiff's garage into the car before driving it away, all to plaintiff's great shock and embarrassment. Upon information and belief, this treatment of plaintiff was largely based upon race, and it impaired plaintiff's right to make and enforce sales contracts in his work as a sales representative for defendant Loma Linda Foods, Inc., in violation of Section 1981.

10. As a proximate result of defendants' discrimination against plaintiff, plaintiff has sustained and continues to sustain substantial losses in earnings and other employment benefits. Plaintiff is thus entitled to recover compensatory damages from defendants in an amount according to proof.

11. Defendants did the acts alleged herein maliciously, fraudulently and oppressively and with the wrongful intention of injuring plaintiff and with an improper and

evil motive amounting to malice. Plaintiff has suffered and continues to suffer humiliation and mental anguish, all to his damage, and is thus entitled to recover punitive damages from defendants in an amount according to proof.

WHEREFORE, plaintiff requests judgment against said defendants jointly and severally for compensatory damages in the amount of Six Hundred Twenty Thousand Dollars ($620,000.00) or according to proof, and for exemplary and punitive damages in the amount of Nine Hundred Thousand Dollars ($900,000.00) or according to proof; for an order requiring defendant Loma Linda Foods, Inc., to modify its practices and policies which result in unlawful discrimination based on race, all together with the costs of this action, statutory attorneys' fees pursuant to 42 USC, Section 1988; and other relief, both legal and equitable, as the Court deems just.

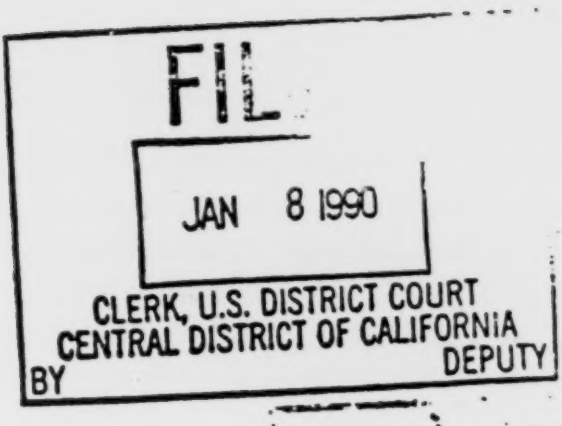
JURY DEMAND

Plaintiff hereby demands jury trial of all claims herein stated.

DATED: September 11, 1989

ROBINSON, DeMILLS &
ASSOCIATES, P.C.

By:_____
Edward E. Robinson
Attorneys for Plaintiff



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ERNEST L. CLARKE, Plaintiff, v. LOMA LINDA FOODS, INC.; LARRY BOGGESS; TED O. COOK; NABIL RAZZOUK; ADAM SCHLERETH; and JAMES SMEENGE, Defendants.	No. CV 88-1403 RB(Ex) MEMORANDUM OF DECISION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Defendant Loma Linda moves, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss plaintiff's Second Amended Complaint claiming violations of 42 U.S.C. §1981. The individual defendants join in Loma Linda's motion. For the reasons explained

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below, the Court grants the motion as to all the claims, and the action is ordered dismissed without leave to amend.

Allegations and Procedural Background

This is an action for racial discrimination brought under 42 U.S.C. §1981. Plaintiff is Ernest L. Clarke ("Clarke"). Defendants are Loma Linda Foods, Inc. ("Loma Linda"); Larry Boggess ("Boggess"); Ted O. Cook ("Cook"); Nabil Razzouk ("Razzouk"); Adam Schlereth ("Schlereth"); and James Smeenge ("Smeenge") (collectively "defendants").

The Second Amended Complaint, asserting eleven claims for relief under §1981, alleges in substance that Clarke, a sales employee of Loma Linda, was reassigned by his employer, apparently in 1983, to an all-black sales territory in Chicago's southside, and that thereafter, in early 1985, he requested to be assigned to a sales territory in San Diego, but was re-assigned instead to a predominately black sales territory in the New York City-Connecticut area. He refused to take the assignment and was terminated on June 4, 1985. Clarke alleges that all of these acts — the transfers, the refusal to transfer and his termination — were racially motivated. Further, he alleges that, by virtue of these acts, the defendants impaired his "right to make and enforce his employment contract" (Claims 1 to 5) and his "right to make and enforce sales contracts in his work as a sales representative of Loma Linda" (Claims 6 to 11).

Clarke filed his initial complaint on June 2, 1987, in the United States District Court for the Northern District of Illinois, and it was assigned to U.S. District Judge Shadur. On December 21, 1987, Clarke filed a first amended complaint. Defendants filed an answer that did not raise the affirmative defense of the statute

of limitations, and then moved to transfer the action. In February 1988, Judge Shadur ordered the case transferred to this District pursuant to 28 U.S.C. §1406(a), adding that "[t]o avoid any potential limitations question, transfer rather than dismissal is called for, and this action is indeed ordered transferred to the United States District Court for the Central District of California." Memorandum of Decision and Order at 5 (February 25, 1988) (footnote omitted).

On July 28, 1989, Loma Linda filed a summary judgment motion based largely on *Patterson v. McLean*, 109 S.Ct. 2363 (1989). This Court treated that motion as a motion to dismiss under Rule 12(b)(6) and dismissed the First Amended Complaint for failure to state a claim. Clarke was given twenty days to amend.

On September 11, 1989, Clarke filed his Second Amended Complaint, serving it by mail on opposing counsel on September 12, 1989. On October 4, 1989, Loma Linda filed this motion to dismiss. On October 10, 1989, the rest of the defendants filed a joinder in Loma Linda's motion.

Contentions

Defendants contend that all eleven §1981 claims are barred by the one-year statute of limitations, and that all claims allege post-employment acts not actionable under §1981 in light of *Patterson v. McLean*.

Clarke raises numerous points in opposition:

(a) defendants' motion is not timely because it was not filed within twenty days of Clarke's serving the Second Amended Complaint;

(b) concerning the statute of limitations: (i) defendants did not plead the statute of limitations in their answer to the first amended complaint and cannot do so now;

(ii) Judge Shadur's transfer order decided the limitations issue against defendants; (iii) the statute of limitations was tolled while the individual defendants were out of the state; (iv) the Pre-Trial Conference Order did not raise the issue, and it cannot be raised now; (v) California's three-year statute, not the one-year statute, applies; (vi) even if the one-year statute applies, Clarke may have other claims, making dismissal without leave inappropriate;

(c) his allegations concerning Loma Linda's relocation policies, *see* 4th Claim, ¶ 9, state a §1981 claim;

(d) his claims are essentially racially motivated termination claims, which §1981 covers;

(e) the U.S. Supreme Court's granting *certiorari* in a §1981 case suggests §1981 covers wrongful discharge; and

(f) his claims are essentially claims for refusal to hire, to which §1981 applies.

In reply, defendants insist that (1) their motion is timely; (2) the statute of limitations argument is viable, because they have not yet responded to the Second Amended Complaint; (3) Judge Shadur never addressed the issue whether the action is barred by the statute of limitations; (4) the one-year statute applies, and Clarke's cases are distinguishable; (5) *Patterson* clearly bars plaintiff's §1981 claims; and (6) §1981 does not apply to racially motivated terminations.

Analysis

1. 12(b)(6) standard

"The conditions that must be met before a motion may be granted under Fed. R. Civ. P. 12(b)(6) are quite strict. '[A] complaint should not be dismissed for failure

to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Conley v. Gibson,* 335 U.S. 41, 45-46 (1957). In applying this standard, [the court] must treat all of the plaintiff's allegations as true." *Church of Scientology of California v. Flynn,* 744 F.2d 694, 695-96 (9th Cir. 1984) (some citations omitted); *see also Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984). Thus, "[o]n a motion to dismiss, material [factual] allegations of the complaint are taken as admitted and the complaint is to be liberally construed in favor of the plaintiff." *Keniston v. Roberts,* 717 F.2d 1295, 1300 (9th Cir. 1983).

"Ordinarily, leave to amend should be freely given in the absence of prejudice to the opposing party." *Id.* (citations and quotations omitted); Fed. R. Civ. P. 15(a). However, leave to amend may be denied where there has been a repeated failure to cure deficiencies by amendments or where it is apparent that further amendment would be an exercise in futility. *Id.* (citing *Foman v. Davis,* 371 U.S. 178, 182 (1962)).

2. Timeliness of This Motion

Loma Linda's motion to dismiss is timely. Clarke's service of the Second Amended Complaint by mail extended the twenty-day period by which Loma Linda had to respond by three days. *See* Fed. R. Civ. P. 6. In addition, Clarke did not apply for the clerk's entry of any defendant's default. Absent such an application, the other defendants could and did file a technically late response. *E.g.,* Schwarzer, Tashima & Wagstaffe, *Federal Civil Procedure Before Trial,* par. 6:3 (1989). By joinder in the Loma Linda's motion, the other defendants have responded.

3. Timeliness of the Statute of Limitations Issue

Defendants timely raised the statute of limitations issue. The First Amended Complaint, to which defendants filed an answer, has been dismissed. The operative pleading is now the Second Amended Complaint, which supersedes the prior complaints and renders them of no legal effect. *E.g., Fritz v. Standard Security Life Ins. Co.,* 676 F.2d 1356, 1358 (11th Cir. 1982); 6 Wright & Miller, *Federal Practice and Procedure* §1476 at 389 (1971 & Supp. 1989). An initial responsive pleading is superseded by the response to an amended complaint. Wright & Miller, §1476 at 391 & n.26. This motion, then, is defendants' first response to the operative pleading.

In any event, because defendants could have added the statute of limitations defense by motion at a later stage in the litigation, it is appropriately raised now. *Accord Sylla v. Massey-Ferguson Inc.,* 595 F.Supp. 590, 591-92 (E.D. Mich. 1984) (granting summary judgment motion on statute of limitations issue, even though defendant did not raise it in the answer).

For these same reasons, the Court is not persuaded by Clarke's arugument that the Pre-Trial Conference Order (which was filed before the Second Amended Complaint) bars assertion of a limitations defense.

4. Judge Shadur's Treatment of the Statute of Limitations

Judge Shadur did not decide whether the statute of limitations bars this action. He transferred, rather than dismissed, this action "to avoid potential limitations question." Judge Shadur alluded to the possibility that, if the case had been dismissed rather than transferred, the statute of limitations could have run before Clarke

could re-file it. *See Burnett v. New York Central C. R. Co.*, 380 U.S. 424, 430 & n.7 (1964). To avoid that problem, he transferred the case.

5. Which Statute of Limitations (One-year or Three-year) Applies

The Court concludes that California's one-year statute of limitations applies to an action under 42 U.S.C. §1981.

Preliminarily there is the issue of which jurisdiction's law — Illinois or California — applies. The law of the transfer*ee* jurisdiction, not the transfer*or* jurisdiction, applies to a case transferred under §1406(a), *e.g., Nelson v. International Paint Co.*, 716b F.2d 640, 643 (9th Cir. 1983), *cert. denied,* 108 S.Ct. 1027 (1988); *see generally* 1 J.W. Moore, *Moore's Federal Practice* par 0.145[.4 - .5] (2d ed. 1989), including the transferee jurisdiction's statute of limitations. *E.g., LaVay Corp. v. Dominion Federal Savings & Loan Ass'n*, 830 F.2d 522, 526-27 (4th Cir. 1987), *cert. denied,* 108 S.Ct. 1027 (1988); *Haglund v. Dow Chemical Co.*, 35 Fed. R. Serv. 2d (Callaghan) 107, 114-15 (E.D. Cal. 1982). This is so even if the complaint was filed within the transferor jurisdiction's statute of limitations; the transferee jurisdiction's shorter statute of limitations still bars the claim. *LaVay,* 830 F.2d at 526-27; *T-Birds, Inc. v. Thoroughbred Helicopter,* 540 F.Supp. 548, 550-51 (E.D. Ky. 1982) (applying transferee's shorter statute of limitations to bar claim; granting summary judgment).

Next, there is the issue of what statute of limitations applies in this case. Clarke posits that when he initially filed his complaint (June 2, 1987) California's three-year statute applied, *see* Cal. Civ. Proc. Code §338((a); he concludes it still applies. Section 338(a) provides that "[a]n action upon a liability created by statute, other

than a penalty or forfeiture," must be brought within three years.

Defendants counter that the one year statute, Cal. Civ. Proc. Code §340(3), applies. Section 340(3) provides that the following actions must be brought within one year:

> An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by another by the wrongful act or neglect of another . . . .

Defendants are correct: the one-year statute applies to an action under 42 U.S.C. §1981 filed in California.

Because neither §1981 nor §1983 provide a statute of limitations, courts must "borrow" the most appropriate state statute. *Goodman v. Lukens Steel Co.,* 107 S.Ct. 2617, 2620 (1987) (§1981); *Wilson v. Garcia,* 105 S.Ct. 1938, 1942 (1985) (§1983). When a state has more than one statute of limitation, the personal injury statute applies. *Wilson,* 105 S.Ct. at 1947-49; *see also Owen v. Okure,* 109 S.Ct. 573, 576-82 (1989).

Since the Supreme Court's decision in *Goodman* (decided June 19, 1987), it has been clear that the same statute of limitations which applies to §1983 actions also applies to §1981 actions. This proposition had been established in this Circuit much earlier. *Bratton v. Bethelehim Steel Corp.,* 649 F.2d 658,663 (9th Cir. 1980).

Since the Supreme Court's decision in *Wilson v. Garcia,* (decided April 17 1985), it has been clear that California's one-year personal injury limitation period applies to §1983 actions. *Del Percio v. Thornsley,* 877 F.2d 785, 786 (9th Cir. 1989); *Merritt v. County of Los Angeles,* 875 F.2d 765, 767 fn.1 (9th Cir. 1989). Given

the Ninth Circuit's rationale in *Bratton,* it was reasonable to conclude that after April 17, 1985, the one-year limitation period applied to both §1983 and §1981 actions filed in California. Any doubts on this score, of course, were removed by the Supreme Court in *Goodman.*

The last wrongful act alleged in the Second Amended Complaint occurred on June 4, 1985. As previously noted, this action was filed June 2, 1987. Thus, the action is time-barred.

The Ninth Circuit addressed the retroactivity of *Wilson* in *Usher v. City of Los Angeles,* 828 F.2d 556 (9th Cir. 1987), and held:

> in states such as California, where the effect of *Wilson v. Garcia* is to shorten the limitation period for 42 U.S.C. § 1983 actions, the limitation period for causes of action arising prior to *Wilson* shall be either (1) the pre-*Wilson* period, commencing at the time the cause of action accrues, or (2) the post-*Wilson* period, commencing with the *Wilson* decision, *whichever expires first.*

Usher, 828 F.2d at 561 (emphasis added).

Applying *Usher* to the last wrongful act alleged, the plaintiff's claims were time-barred after June 4, 1986.

Plaintiff urges that the Court apply an *Usher* retroactivity analysis to the *Goodman* case, *i.e.,* permit a pre-*Goodman* plaintiff to file an action either within three years or within one year of *Goodman*, whichever comes first. Under this approach, plaintiff claims are not time-barred.

The flaw in plaintiff's argument is that there is a fundamental difference between the situation faced by the Ninth Circuit in *Usher* and that presented in the case *sub judice*. *Wilson* overturned clear Ninth Circuit precedent. *Goodman* did not. As explained above, the existence of a three-year statute of limitations for §1981 actions filed after *Wilson* was in serious doubt, particularly because the Ninth Circuit had previously equated §1981 with §1983 for statute of limitations purposes. *Bratton, supra,* 649 F.2d at 663. At the very least, whether the limitations period for a §1981 action filed in California was one year or three years was very much up in the air after *Wilson,* because the Ninth Circuit had "not ruled on the question." *Jones v. Bechtel,* 788 F.2d 571,574 (9th Cir. 1986).

6. Tolling of the Statute of Limitations

Clarke, however, argues that §340(3) was tolled — an issue defendants do not address.

The possiblility of statutory tolling precludes dismissal against the individual defendants based on the statute of limitations; but the tolling statute does not apply to Loma Linda.

The relevant California tolling statute provides

> If, when a cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

Cal. Civ. Proc. Code §351 (West's 1982). This tolling statute applies to civil rights claims. *Maurer v. Individually and As Members of Los Angeles County,* 691 F.2d 434, 436-37 (9th Cir. 1982) (§1983 claims).

The Second Amended Complaint does not allege whether or when the individual defendants were out of state after the claims accrued; in fact, it does not allege in which states they reside. Because it does not "appear[] beyond doubt that the plaintiff can prove no set of facts in support of his claims entitling him to relief," *Conley*, 355 U.S. at 45-46, dismissal on statute of limitations grounds is inappropriate as to the individual defendants.

Section 351, however, does not apply to corporations. *Epstein v. Frank,* 125 Cal.App.3d 111, 119 n.4 (1981); *Loope v. Greyhound Lines, Inc.,* 114 Cal.App.2d 611, 614 (1952). Hence, the claims against Loma Linda were not tolled by the statute.

Accordingly, the claims against Loma Linda only are dismissed on the ground that they are barred by California's one-year statute of limitations.

7. ***Patterson v. McLean***

The Court now turns to the issue whether the Second Amended Complaint states a claim in light of *Patterson v. McLean*, 109 S.Ct. 2363 (1989), and concludes it does not. *Patterson* teaches that Title VII, not §1981, covers an employer's post-employment racial discrimination against its employees — with, however, one limited exception: claims for failure to promote because of race where the effect of the promotion would be to enter into a "new contract," *i.e.,* a "new and distinct" relationship with the employer. As the Supreme Court explained:

> the question whether a promotion claim is actionable under §1981 depends on whether the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer. If so, then the employer's refusal to enter the new contract is actionable under §1981. . . . Only where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under §1981.

Patterson, 109 S.Ct. at 2377.

None of the eleven claims allege that plaintiff was denied a promotion, much less that he was denied an opportunity to enter into a distinctly new contractual relationship with his employer. Indeed, the conduct complained of in claims 1-5, although no doubt actionable under Title VII of the Civil Rights Act, is the type of post-employment conduct held in *Patterson* to fall outside of §1981.

The fifth claim alleges that plaintiff was told to move to New York or be fired. Plaintiff alleges constructive termination. Yet §1981 does not reach discriminatory discharge of an employee. *See, Overby v. Chevron USA, Inc.*, 884 F.2d 470, 473 (9th Cir. 1989). In *Overby*, the Ninth Circuit, interpreting *Patterson*, held that §1981 does not cover retaliatory discharge. By analogy, §1981 cannot be said to cover discriminatory discharge, constructive or otherwise.

In claims 6-11, plaintiff alleges that his termination impaired his ability, as a sales employee, "to make and enforce sales contracts. . . ." This is indeed plaintiff's most imaginative effort to avoid the sweep of *Patterson*. Regrettably, this effort falls short.

Holding that *Patterson* permits such an end run would lead to anomalous results. It would mean that only employees engaged in sales would have protection under §1981 for discriminatory discharge by their employers; whereas no other type of employee would.

On the face of the Second Amended Complaint, it is clear that plaintiff was an employee of defendant Loma Linda. The pleading is replete with references to his "employment" by plaintiff. *See e.g.*, Second Amended Complaint, p. 1, l. 23 ("This is an action . . . against his former *employer*"); p. 4, l. 5 ("his *employment* was terminated"); p.4, l. 20-21 (". . . plaintiff was *employed* by defendants . . .") (emphasis added). It is evident that plaintiff entered into sales contracts as an agent for his principal, Loma Linda.

The Court is mindful of the Supreme Court's admonition in *Patterson* to refrain from "twist[ing] the interpretation" of §1981 to cover conduct otherwise subject to remedies provided under Title VII. To read §1981's language — "the same right . . . to make . . . contracts . . . as is enjoyed by white citizens" — to include a right of sales employees to make contracts for others would be precisely the type of stretching and straining the Supreme Court enjoined the lower courts to eschew. The Court concludes that permitting only sales employees to bring actions under §1981 for discriminatory termination would "circumvent the detailed remedial scheme" of Title VII. *Patterson*, 109 S.Ct at 2375.

8. Retroactivity of *Patterson*

At oral argument, plaintiff's counsel for the first time urged that this Court refrain from giving *Patterson* retroactive application. Plaintiff failed to raise this issue

in his brief, and the Court need not consider it. Local Rule 7.9. Nonetheless, even had this issue been timely raised and briefed, the Court would be constrained to give *Patterson* retroactive effect.

The general rule is that civil cases are decided "in accordance with the law existing at the time of decision." *Goodman v. Lukens Steel,* 482 U.S. 656, 662 (1987); *see also Robinson v. Neil,* 409 U.S. 505 (1973). Accordingly, decisions of the Supreme Court are usually applied retroactively in civil cases. However, as the Supreme Court explained in *Chevron Oil v. Huson,* 404 U.S. 97 (1971), there is an exception to this general rule. A decision should be given only prospective application if three criteria are satisfied:

(1) the holding must establish a new principle of law, either by overruling clear past precedent on which litigants have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed;

(2) the merits and demerits of each case must be weighed by looking to the history of the rule in dispute, its purpose and effect, and whether retroactive operations will further or retard the rule's operation; and

(3) retroactive application must create the risk of producing substantially inequitable results. *Chevron v. Huson,* 404 U.S. at 106-07.

Plaintiff does not satisfy either of the first two factors. In this regard, it does not appear that *Patterson* overruled any clear precedent. The decision itself does not purport to overrule past precedent; the decision merely "reaffirm[s] that §1981 prohibits racial discrimination in the making and enforcement of private contacts."

Patterson, 109 S.Ct. at 2370. The Ninth Circuit has described *Patterson* as "confirm[ing]" and "clarif[ying]" §1981's scope. *Overby*, 884 F.2d at 472. Hence, the first *Chevron v. Huson* criteron is not met. *Accord, Prather v. Dayton Power & Light Co.*, 1989 U.S. Dist. LEXIS 10756 at *2-3 (Sept. 7, 1989 S.D. Ohio).

Moreover, plaintiff fails to satisfy the second criterion. *Patterson* teaches that §1981 does not cover the conduct of which Clarke complains. The Supreme Court refused to read §1981 "broadly where the result is to circumvent the detailed remedial scheme" of Title VII. *Patterson*, 109 S.Ct. at 2375. The Court concluded that Title VII, not §1981, is the proper remedy for persons alleging that they have been discriminated against in their terms and conditions of employment. The remedies and procedures of Title VII reflect a congressional choice that balances the concerns of both employers and employees. The purpose to be served by *Patterson, viz.*, preserving the balance between §1981 and Title VII, is best served by applying *Patterson* retroactively. *Accord, Thompson v. Johnson & Johnson Management Center*, U.S. Dist. LEXIS at *5; *Brackshaw*, 723 F.Supp. at 62.

This conclusion accords with the holdings of the vast majority of the federal courts that have addressed the issue whether *Patterson* applies retroactively. *See Malekian v. Pottery Club of Aurora, Inc.*, 1989 U.S. Dist. LEXIS 13687*7 (D. Col. November 9, 1989); *Williams v. Edsal Mfg. Co.*, 1989 U.S. Dist. LEXIS 12606 *8 n.3 (N.D. Ill. October 24, 1989); *Prather v. Dayton Power & Light Co.*, 1989 U.S. Dist. LEXIS 10756 (Sept. 7, 1989 S.D. Ohio); *Brackshaw v. Miles*, 723 F.Supp. 60 N.D. Ill. 1989); *Morgan v. Kansas City Area Trans. Authority*, 720 F.Supp. 758, 759-61 (W.D. Mo. 1989); *Hll v. County of Cook*, 719 F.Supp. 721, 725 n.3 (N.D.

Ill. 1989); *Jorday v. U.S. West Direct Do.*, 716 F.Supp. 1366, 1368 (D. Colo. 1989) (granting motion to dismiss); *Williams v. National Railroad Passenger Corp.*, 716 F.Supp. 49, 50 n.1 (D.D.C. 1989) (declining to depart from general rule applying cases retroactively; granting summary judgment). *But see Thomas v. Beech Aircraft Corp.*, 1989 U.S. Dist. LEXIS 11284 (D. Kan. Sept. 25, 1989); *Gilsepie v. First Interstate Bank of Wis. S.E.*, 717 F.Supp. 649 (E.D. Wis. 1989) (refusing to apply *Patterson* retroactively when action had already been tried and the retroactivity issue was before the court on post-verdict motions).

9. Denial of Leave to Amend

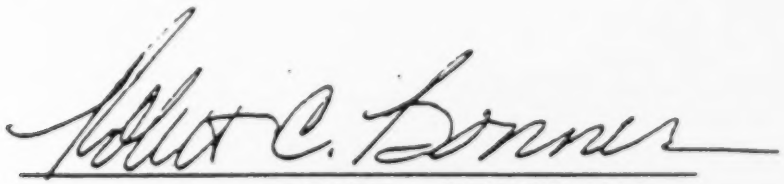
The plaintiff was given an opportunity to amend his complaint in light of *Patterson*. In view of the statute of limitations bar and the failure to state a claim under *Patterson*, the Court concludes that leave to amend again would be an exercise in futility. *Kenniston*, 717 F.2d at 1300.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss the Second Amended Complaint is granted, and the action is dismissed without leave to amend.

IT IS SO ORDERED

Dated: January 8, 1990



ROBERT C. BONNER
UNITED STATES DISTRICT JUDGE

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11852 Santa Monica Boulevard, Suite 3, Los Angeles, California 90025; that on December 2, 1991, I served the within *Brief In Opposition To Petition* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(By Express Mail: original and forty copies)

Clerk, U.S. Court of Appeals
Ninth Judicial Circuit
50 United Nations Plaza
Room 59
San Francisco, CA 94101

Clerk, U.S. District Court
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Central District
United States Courthouse
312 North Spring Street
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I declare under penalty of perjury that the foregoing is true and correct. Executed on December 2, 1991, at Los Angeles, California.

Betty J. Malloy
(Original signed)

Supreme Court, U.S.
FILED
DEC 6 1991
OFFICE OF THE CLERK

(3)

No. 91-786

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

ERNEST L. CLARKE,

Petitioner,

v.

LOMA LINDA FOODS, INC., LARRY BOGGESS, TED O. COOK, NABIL RAZZOUK, ADAM SCHLERETH, and JAMES SMEENGE,

Respondents.

BRIEF IN OPPOSITION TO PETITION

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ATTORNEYS FOR RESPONDENTS
LARRY BOGGESS, TED O. COOK, NABIL RAZZOUK, ADAM SCHLERETH, JAMES SMEENCE
(LOMA LINDA EMPLOYEES)

QUESTIONS PRESENTED

1. May a plaintiff-employee who has failed to allege: (1) the existence of an internal administrative procedure to address a grievance with his employer under his employment contract; (2) any attempt on his part to comply with such a procedure; or (3) any interference by the defendant-employer with such an attempt raise, for the first time on petition for certiorari to this Court, a claim that there has been an impairment of his right to enforce his employment contract under 42 U.S.C. Section 1981?

2. Does the language of 42 U.S.C. Section 1981, "make and enforce contracts," extend to prospective agreements a sales employee may enter with customers on behalf of his employer?

3. May one who voluntarily abandons his employment duties maintain an action pursuant to 42 U.S.C. Section 1981 against his employer for racially motivated discharge?

4. Does plaintiff's complaint in the Federal District Court of California, Central District, state a cause of action upon which relief can be granted under 42 U.S.C. Section 1981 given the one-year statute of limitations set forth in California Code of Civil Procedure, section 340, subdivision (3)?

5. Are factual allegations of incorrect lower court rulings, without any argument or authority to support those allegations, sufficient to obtain review of this Court through a Petition for Writ of Certiorari?

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Respondents, LARRY BOGGESS, TED O. COOK, NABIL RAZZOUK, ADAM SCHLERETH and JAMES SMEENGE ("LOMA LINDA EMPLOYEES") hereby submit their Brief in Opposition to the Petition for Writ of Certiorari filed by ERNEST L. CLARKE seeking review of the Ninth Circuit Court Appeals decision rendered in this matter May 28, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals, was in the form of a Memorandum Decision, not approved for publication. It is reported as Table Case at 933 F.2d 1013, 1991 U.S. App. LEXIS 22733. The full text appears in the petitioner's appendix, and the opinion of the District Court appears in the appendix of respondent's, LOMA LINDA FOODS, INC., Brief in Opposition to Petition.

JURISDICTION

LOMA LINDA EMPLOYEES take no issue with the statement of jurisdiction set forth in the Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES

Respondents, LOMA LINDA EMPLOYEES, join in Respondent's, LOMA LINDA FOODS, INC., Statement of Constitutional Provisions and Statutes, and hereby incorporate that Statement in its entirety by reference.

INTRODUCTION

LOMA LINDA EMPLOYEES join Respondent, LOMA LINDA FOODS, INC., in arguing that the Petition fails to meet the criteria necessary for review by petition for writ of certiorari as set forth in the rules of this Court and decisional law and is therefore without merit. Careful

analysis of the Petition for Certiorari reveals no claim that the Ninth Circuit opinion conflicts with decisions of this Court or creates a conflict in decisions between circuits, or presents an issue of federal law not previously settled by this Court. Therefore, CLARKE's Petition for Certiorari should be denied.

STATEMENT OF THE CASE

LOMA LINDA EMPLOYEES hereby incorporates in its entirety the Statement of the Case as put forth in the Brief in Opposition to Petition filed by LOMA LINDA FOODS, INC.

STATEMENT OF FACTS

LOMA LINDA EMPLOYEES hereby incorporates in its entirety the Statement of Facts as put forth in the Brief in Opposition to Petition filed by LOMA LINDA FOODS, INC.

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS FAILED TO ESTABLISH A SPECIAL OR IMPORTANT REASON AS REQUIRED BY THE RULES OF THIS COURT FOR ISSUANCE OF A WRIT OF CERTIORARI

The factors this Court considers when evaluating a petition for writ of certiorari include whether a Circuit Court of Appeals of the United States has: rendered a decision in conflict with a decision of another Circuit Court on the same matter (Sup.Ct.R.10.1(a)); decided an important questions of federal law which has not been, but should be, settled by this Court (Sup.Ct.R.10.1(c)); or decided a federal question in a way that conflicts with applicable decisions of this Court (Sup.Ct.R.10.1(c)). None of these factors are present in this case.

As his first reason for granting the Writ, CLARKE states that "the Court below

failed to give due emphasis to the fact that the primary focus of the Patterson case is the "contract" aspect of 42 U.S.C. Section 1981..." (Pet., p.5) However, CLARKE fails to identify any Circuit Court cases which are in conflict with the Ninth Circuit's application of Patterson v. McClean Credit Union, 491 U.S. at 180, and does not reveal any way in which the Ninth Circuit opinion conflicts with this Court's decision in Patterson, or with any other opinion of this Court. CLARKE's true focus is that Patterson was wrongly decided, which he unsuccessfully argued to the Ninth Circuit. The Court of Appeals correctly held that Patterson was binding authority which that Court had no authority to overturn. (App.15, n.2) Upon review, it is clear the Ninth Circuit properly applied Patterson to the facts of this case.

Petitioner's second stated reason for grant argues that when read together, the Ninth Circuit opinion and Patterson act to grant immunity to employers when they impair the right of an employee to make sales contracts. (Pet., p.9) No such immunity applies in this case. 42 U.S.C. Section 1981 was the sole basis for all claims pled by CLARKE in his complaint. Patterson clearly states that employment discrimination claims of this type are appropriately asserted under Title VII the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, et seq., rather than under the more limited Section 1981. Patterson v. McLean Credit Union, 491 U.S. at 180. Consequently, the Ninth Circuit opinion in no way prevents other potential claims for relief under state or federal law. Rather than supporting any reason to grant CLARKE's Petition, this indicates the

Ninth Circuit opinion is in line with the holdings of this Court and other Circuit Courts.

CLARKE's final reason for grant is based entirely on contentions of fact. As this Court will not review mere conflicts in the evidence, National Labor Relations Board v. Pittsburgh S.S. Co., 240 U.S. at 503, this is an improper basis for this Court to review the decision of the Ninth Circuit. In addition, while CLARKE asserts four District Court rulings were incorrect, he fails to cite a single authority or offer a solitary argument explaining why any one of them was incorrectly decided.

II.

CLARKE'S COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED AS IT CONTAINS NO ALLEGATIONS LOMA LINDA INTERFERED WITH HIS RIGHT TO USE LEGAL PROCESS IN AN EFFORT TO ENFORCE HIS EMPLOYMENT CONTRACT

LOMA LINDA EMPLOYEES hereby incorporates in its entirety the discussion regarding Petitioner's failure to state a claim as put forth in the Brief in Opposition to Petition filed by LOMA LINDA FOODS, INC. In addition, LOMA LINDA EMPLOYEES assert that the Civil Rights Act of 1991 (Pub.L.102-166) does not act to overrule the application of Patterson to this case. Patterson clearly held that the right to enforce a contract protected by 42 U.S.C. Section 1981 is the right to use legal process to enforce that contract. The Civil Rights Act of 1991 merely codifies the definition of the term 'make and enforce contracts' already

contained in 42 U.S.C. Section 1981. It does not alter or expand the rights of enforcement set forth in Patterson. For the reason stated in Respondent's, LOMA LINDA FOODS, INC., Brief in Opposition to Petition, CLARKE has failed to state a claim upon which relief may be granted.

III.

42 U.S.C. SECTION 1981 DOES NOT INCLUDE THE RIGHT OF AN EMPLOYEE TO MAKE SALES CONTRACTS WITH CUSTOMERS OF HIS EMPLOYER

LOMA LINDA EMPLOYEES hereby incorporates in its entirety the discussion on the applicability of 42 U.S.C. Section 1981 regarding the rights of an employee to make sales contracts with customers of an employer as put forth in the Brief in Opposition to Petition filed by LOMA LINDA FOODS, INC.

IV.

CLARKE'S COMPLAINT FAILS TO ALLEGE SUFFICIENT FACTS TO SUPPORT A CLAIM OF RACIALLY MOTIVATED DISCHARGE

In his complaint, CLARKE acknowledged he voluntarily chose not to report on June 3, 1985, to his newly assigned sales territory. Therefore, CLARKE was never discharged, but resigned of his own volition.

CLARKE's Brief on Appeal to the Ninth Circuit revealed the true basis of his claim of racially motivated discharge, that "conduct on the part of defendants made it impractical for him to continue." ("Brief of Appellant," p.17.)

As it is clear no actual direct discharge occurred in this case, petitioner's claim must meet the requirements for constructive discharge. A constructive discharge must be based on objective criteria which create

intolerable conditions a reasonable person could not expected to bear. Yeats v. Avco Corp., 819 F.2d. 630, 636-637 (CA6 1987); Darnell v. Campbell County Fiscal Court, 731 F.Supp. 1309, 1312-13 (E.D.Ky. 1990). Therefore, CLARKE's pleadings fail to rise to the level required to state a claim for constructive discharge.

V.

CLARKE'S CLAIMS BASED UPON 42 U.S.C. SECTION 1981 ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

LOMA LINDA EMPLOYEES hereby incorporates in its entirety the discussion on the applicability of the Statute of Limitations as put forth in the Brief in Opposition to Petition filed by LOMA LINDA FOODS, INC.

VI.

CONCLUSION

For the above stated reasons, the Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED,

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